United States Department of Labor
Employees' Compensation Appeals Board

B.J., Appellant	)	
and	)	**Docket No. 16-0364**
	)	**Issued: June 22, 2016**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Richmond, VA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 21, 2015 appellant, through counsel, filed a timely appeal from a July 28, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than five percent permanent impairment of each lower extremity, for which she previously received schedule awards.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case was previously before the Board on nonmerit issues.[2] The facts and circumstances of the prior appeal are incorporated by reference. The relevant facts follow. On September 14, 2005 appellant, then a 45-year-old associate advocate, filed a traumatic injury claim (Form CA-1) alleging that on September 9, 2005 she injured her knees, left elbow, and three fingers on her right hand when she slipped and fell while walking to her car in the performance of duty. She stopped work on September 9, 2005. OWCP accepted appellant's claim for bilateral knee strain. Appellant was on and off work and received disability compensation for intermittent periods.

On July 16, 2008 appellant filed a claim for a schedule award (Form CA-7).

By letter dated October 29, 2008, OWCP advised appellant that, under FECA, schedule awards were not granted for soft tissue injuries such as sprains and strains and requested that she provide medical evidence to establish that she sustained a bilateral knee injury causally related to her September 9, 2005 employment injury, which warranted a schedule award.

In a December 4, 2008 report, Dr. Anuj Gupta, Board-certified in orthopedic surgery, related appellant's complaints of bilateral anterior knee pain and conducted an examination. He observed mild swelling in both joints and maximum tenderness over the lateral facet of both patellofemoral compartments with no tenderness or instability was noted medially and laterally. Dr. Gupta diagnosed bilateral knee arthrosis and opined that the primary cause of appellant's knee pain was chronic arthrosis of both knees and significant loss of the patellofemoral cartilage. He reported that appellant did not require surgery and had reached maximum medical improvement. Dr. Gupta advised that appellant could continue working full duty.

Utilizing Table 17-31 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001), Dr. Gupta determined that appellant had 4 percent whole person impairment and 10 percent impairment of the lower extremity. He explained that because appellant merely exacerbated a preexisting condition as a result of her work injury only 50 percent of the impairment rating was work related. Dr. Gupta concluded, therefore, that appellant had 2 percent whole person permanent impairment and 5 percent impairment of the lower extremity for each knee for a total of 10 percent permanent impairment of the lower extremities.

On September 2, 2009 appellant filed an additional claim for a schedule award.

In a letter dated September 9, 2009, OWCP requested that appellant's physician provide his opinion on whether appellant had reached maximum medical improvement and whether she sustained any impairment in accordance with the sixth edition of the A.M.A., *Guides.* No response was received.

By decision dated November 16, 2009, OWCP denied appellant's schedule award claim on the basis of insufficient medical evidence. It found that she did not submit a report from her

[2] Docket No. 11-677 (issued September 26, 2011).

treating physician which established that she sustained a permanent impairment under the sixth edition of the A.M.A., *Guides* due to her September 9, 2005 employment injury.

On November 5, 2010 OWCP received appellant's request, through counsel, for reconsideration. Appellant submitted an October 21, 2010 report by Dr. Gupta who related appellant's complaints of continued bilateral knee pain. Dr. Gupta noted that he recalculated his previous impairment rating to the sixth edition. Referencing Table 16-3 of the sixth edition of the A.M.A., *Guides*, he reported that appellant was a class 1 for osteoarthritis of both knee joints, which correlated to 10 percent lower extremity impairment for each side, for a total of 20 percent impairment of the bilateral lower extremities. Dr. Gupta reiterated that because appellant aggravated a preexisting condition, only 50 percent of the impairment rating was attributable to her work injury, which lowered appellant's impairment rating to 10 percent permanent impairment of the bilateral lower extremities.

By decision dated November 23, 2010, OWCP denied appellant's request for reconsideration finding that she did not submit any evidence that warranted further review of the merits. It found that the medical evidence was either duplicative or immaterial to appellant's schedule award claim because the diagnosed condition was unrelated to appellant's work injury.[3]

Appellant filed an appeal to the Board. In a decision issued on September 26, 2011, the Board found that Dr. Gupta's October 21, 2010 report constituted new evidence that was relevant to appellant's schedule award claim. The Board remanded the case to OWCP to review this evidence and further develop the case as it deemed necessary.[4]

Following the Board's September 26, 2011 decision, OWCP referred appellant's claim to an OWCP medical adviser to determine whether appellant had reached maximum medical improvement and sustained permanent impairment to her lower extremities. In a handwritten October 7, 2011 report, Dr. James W. Dyer, a Board-certified orthopedic surgeon and OWCP medical adviser, noted that appellant's claim was accepted for bilateral knee strain. He recounted that appellant's treating physician relied on Table 16-3 of the sixth edition of the A.M.A., *Guides* and assigned 10 percent permanent impairment for each knee due to arthritis. Dr. Dyer explained that he could not calculate impairment for appellant's arthritis since this condition was not accepted by OWCP. He related her complaints of bilateral knee pain as a result of a fall at work and reported that x-rays revealed a small effusion with normal articular cartilage and normal ligaments. Dr. Dyer referenced Table 16-2 of the sixth edition of A.M.A., *Guides* and opined that appellant had one percent impairment for each lower extremity. He noted a maximum medical improvement of October 21, 2010.

[3] On December 3, 2010 OWCP received appellant's request for a telephone hearing before an OWCP Branch of Hearings and Review hearing representative. Appellant resubmitted Dr. Gupta's October 21, 2010 medical report. In a decision dated December 22, 2010, OWCP advised appellant that she was not entitled to an oral hearing regarding her schedule award claim because she had previously requested reconsideration on the same issue.

[4] Docket No. 11-677 (issued September 26, 2011).

On December 5, 2011 OWCP granted appellant a schedule award of one percent permanent impairment for each lower extremity. The award ran for 5.76 weeks from October 22 to December 1, 2010.

On December 14, 2011 OWCP received appellant's request for a telephone hearing before an OWCP hearing representative.

By decision dated January 24, 2012, the OWCP hearing representative determined that Dr. Dyer did not adequately explain how he calculated appellant's impairment rating as he did not specify the diagnosis he used or default grade relied upon in his calculation of impairment. He set aside the December 5, 2011 schedule award decision and remanded the claim for referral to a second opinion examiner.

Following the December 14, 2011 decision, OWCP prepared a statement of accepted facts (SOAF) and referred appellant's claim to Dr. Eric S. Furie, a Board-certified orthopedic surgeon and second opinion examiner. In a March 20, 2012 report, Dr. Furie described the September 9, 2005 employment incident and noted that appellant's claim was accepted for bilateral knee strain. He related appellant's complaints of continued bilateral knee pain when performing activities. Dr. Furie reviewed appellant's history and conducted an examination. He observed decreased sensation to light touch in the bilateral feet and decreased sensation at the level of the left ankle. Examination of appellant's bilateral knees revealed normal alignment and no effusion, abrasion, laceration, or ecchymosis. Dr. Furie also reported negative anterior Lachman examination and negative posterior drawer. He observed tenderness on palpation of her bilateral patellae, left worse on right, tenderness on palpation of the femoral condyles, and minimal tenderness on palpation of both lateral joint lines. Dr. Furie recounted that x-rays revealed no fracture, dislocation, or significant decrease in joint space of both lateral joint lines.

Dr. Furie reported that appellant's current medical findings no longer supported the diagnosis of bilateral knee strain but demonstrated a diagnosis of patellofemoral arthrosis. He explained that her arthrosis may have been aggravated by the fall on her knees and the residual from the injury was now increased articular cartilage, inflammation, and damage. Dr. Furie opined that the September 9, 2005 employment injury caused a permanent aggravation of a preexisting condition. He indicated that the aggravation may cease if appellant underwent surgical treatment, but if appellant was not interested in surgical intervention then she had reached maximum medical improvement. Utilizing table 16-3 of the sixth edition of the A.M.A., *Guides*, Dr. Furie noted that appellant's diagnosis of patellofemoral osteoarthritis was a class 1 Class of Diagnosis (CDX) condition for a default three percent impairment. He assigned grade modifiers of 2 for Functional History (GMFH), 2 for Physical Examination (GMPE), and 1 for Clinical Studies (GMCS). Dr. Furie applied the net adjustment formula for a total adjustment of 2, which resulted in 5 percent permanent impairment rating of each lower extremity for a total of 10 percent impairment of the bilateral lower extremities.

In a May 2, 2012 medical adviser report, Dr. Dyer reviewed Dr. Furie's March 20, 2012 second opinion report and concurred with his calculations that appellant had five percent permanent impairment for each lower extremity due to her patellofemoral arthrosis. He indicated that according to Table 16-3 of the sixth edition of the A.M.A., *Guides,* appellant was a class 1 diagnosis for default three percent permanent impairment. Dr. Dyer provided grade

modifiers of 2 for functional history, 2 for physical examination, and 1 for clinical studies. Applying the net adjustment formula, he determined that appellant had an adjustment of +2, which totaled five percent permanent impairment for each lower extremity. Dr. Dyer reported that since appellant previously received an award for one percent permanent impairment, she was entitled to an additional four percent impairment for each lower extremity. He indicated that appellant reached maximum medical improvement on March 20, 2012, the date of Dr. Furie's second-opinion report.

On May 7, 2012 OWCP expanded appellant's claim to include permanent aggravation of bilateral patellofemoral osteoarthritis of the knees. In a separate decision of the same date, it also granted her an additional four percent permanent impairment for each lower extremity. The award ran for 23.04 weeks from March 21 to August 29, 2012. Appellant did not appeal this schedule award decision.

On March 27, 2014 appellant filed another schedule award claim (Form CA-7).

By letter dated April 7, 2014, OWCP requested that Dr. Gupta provide a medical report based on a recent examination with his medical opinion on whether appellant had more than five percent permanent impairment for each lower extremity in accordance with the sixth edition of the A.M.A., *Guides.*

In a May 16, 2014 report, Dr. Gupta noted a diagnosis of bilateral knee degenerative joint disease and related that appellant continued to complain of significant pain within both knee joints. Upon examination, he observed full extension range of motion to roughly 110 degrees on both sides and crepitus with the patellofemoral compartment on both sides. Dr. Gupta reported that radiographs of both knee joints demonstrated fairly stable degenerative changes within both knee joints. He explained that the symptoms appellant experienced were relatively stable and that the conservative treatment measures did not provide very much relief in her symptoms. Dr. Gupta indicated that because appellant's condition appeared relatively stable, he was not in a rush to have appellant undergo knee replacement surgery.

The employing establishment submitted a position description of her duties as a lead case advocate.

OWCP referred appellant's claim to Dr. Alexander N. Doman, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether appellant had increased permanent impairment, in addition to her previously awarded five percent impairment to each lower extremity, in accordance with the sixth edition of the A.M.A., *Guides.* In an August 21, 2014 report, he described the September 9, 2005 employment injury and noted that her claim was accepted for bilateral knee strain and aggravation of bilateral patellofemoral joint arthrosis. Dr. Doman related appellant's continued complaints of bilateral anterior-type knee pain. Upon examination, he observed tenderness subjectively to pressure under the patellar facet on both the left and right knee. Range of motion was full for appellant's left knee and to 138 degrees for the right knee. Dr. Doman reported no knee effusion and no patellofemoral instability. He recounted that x-rays of the left and right knee were normal and the patellofemoral joint was well aligned. Dr. Doman indicated that maximum medical improvement occurred one year from the date of injury on September 9, 2006. He reported that

his impairment evaluation was based on aggravation of chondromalacia of the patella and explained that this diagnosis was supported by her subjective complaints of knee pain and lack of objective medical findings. Dr. Doman referenced Table 16-3 of the sixth edition of the A.M.A., *Guides* and determined that appellant was a class 1 injury for a criterion of soft tissue. He recounted grade modifiers of 1 for functional history, 1 for physical examination, and 0 for clinical studies, which resulted in a grade B classification. Thus, Dr. Doman concluded that appellant had one percent permanent impairment of each lower extremity.

In a letter dated September 8, 2014, OWCP requested that Dr. Doman clarify whether his impairment rating of one percent for each lower extremity was appellant's total impairment rating or in excess of the five percent permanent impairment that she already received.

On September 13, 2014 Dr. Doman provided a clarification report and explained that the one percent impairment was a final, total impairment and was not in excess of the previously given five percent impairment of each lower extremity.

In September 25 and 29, 2014 reports, Dr. Dyer reviewed Dr. Doman's August 21, 2014 second opinion report and September 13, 2014 addendum. He related that in 2005 appellant had a fall at work which resulted in a bilateral knee strain and aggravation of chondromalacia of her bilateral knees. Dr. Dyer noted a date of maximum medical improvement of September 9, 2006, approximately one year after appellant's work injury. He indicated that a magnetic resonance imaging (MRI) examination showed no fracture but a small effusion. Utilizing Table 16-3 of the sixth edition of the A.M.A., *Guides*, Dr. Dyer opined that appellant was a class 1 B for knee sprain, which resulted in one percent permanent impairment of each lower extremity. He noted that he agreed with Dr. Doman that appellant had a class 1 diagnosis which resulted in one percent impairment, not in excess of the previously awarded five percent permanent impairment.

In a decision dated September 29, 2014, OWCP denied appellant's claim for an increased schedule award. It found that the medical evidence failed to establish that appellant sustained more than five percent impairment of each lower extremity as a result of her work injury.

On October 6, 2014 OWCP received appellant's request, through counsel, for a telephone hearing before an OWCP hearing representative, which was held on May 12, 2015. Appellant was represented by counsel. She related that she had other injuries to her right foot, hip, and back, but had not had any other injuries to her knees other than the September 9, 2005 employment injury. Counsel alleged that OWCP did not follow proper due process procedure because it did not mail a "due process letter" to the medical adviser asking that he explain why the second opinion report was more probative than appellant's treating physician's opinion. He also asserted that OWCP should have referred appellant for an impartial medical examination as a conflict in medical evidence existed between OWCP's physicians and appellant's physicians.

Appellant resubmitted Dr. Gupta's May 16, 2014 report.

By decision dated July 28, 2015, the OWCP hearing representative affirmed the September 29, 2014 OWCP decision.

LEGAL PRECEDENT

An employee seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim, including an injury was sustained in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.[5] Where a claimant has previously received a schedule award and subsequently claims an additional schedule award due to a worsening of his or her condition, the claimant bears the burden of proof to establish a greater impairment causally related to the employment injury.[6]

The schedule award provision of FECA[7] and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by OWCP as the appropriate standards for evaluating schedule losses.[8] Effective February 2009 the sixth edition of the A.M.A., *Guides* was adopted by OWCP.[9]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World health Organization's International Classification of Functioning, Disability and Health.[10] Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition, which is then adjusted by grade modifiers based on functional history, physical examination, and clinical studies. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[11] Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[12]

In determining impairment for the lower extremities, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the knee,

[5] *See A.M.*, Docket No. 13-0964 (issued November 25, 2013).

[6] *Edward W. Spohr*, 54 ECAB 806 (2003).

[7] 5 U.S.C. §§ 8101-8193.

[8] 20 C.F.R. § 10.404 (1999); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

[9] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[10] A.M.A., *Guides* (6th ed. 2009), p. 3, section 1.3.

[11] *Id.* at 494-531.

[12] *Id.* at 23-28; *see also R.V.*, Docket No. 10-1827 (issued April 1, 2011).

the relevant portion of the leg for the present case, reference is made to Table 16-3 (Knee Regional Grid) beginning on page 509.[13] After the class of diagnosis CDX is determined from the Knee Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the grade modifier for functional history, grade modifier for physical examination and grade modifier for clinical studies.[14]

ANALYSIS

OWCP initially accepted appellant's claim for bilateral knee strain and later for permanent aggravation of bilateral patellofemoral osteoarthritis of the knees. It previously issued schedule awards totaling five percent for permanent impairment each of appellant's left and right lower extremity. On March 27, 2014 appellant filed a claim for an increased schedule award. The Board has evaluated the evidence, and finds that appellant has not established impairment greater than five percent impairment of each lower extremity, for which she was previously awarded.

OWCP referred appellant's claim to Dr. Doman for a second opinion examination to determine whether appellant sustained additional impairment of her bilateral lower extremities in excess of her previous five percent award according to the sixth edition of the A.M.A., *Guides.* In an August 21, 2014 report, Dr. Doman accurately described the September 9, 2005 employment injury and noted that her claim was accepted for bilateral knee strain and aggravation of bilateral patellofemoral joint arthrosis. Upon examination, he observed tenderness to pressure under the patellar facet on both knees and no effusion or patellofemoral instability. Range of motion was full for appellant's left knee and to 138 degrees for the right knee. Dr. Doman indicated that maximum medical improvement occurred one year from the date of injury on September 9, 2006.

Utilizing Table 16-3 of the sixth edition of the A.M.A., *Guides*, Dr. Doman determined that appellant was a class 1 injury for a criterion of soft tissue. He explained that his classification was based on the diagnosis of aggravation of chondromalacia of the patella and supported by appellant's subjective complaints of knee pain with lack of objective medical findings. Dr. Doman reported grade modifiers of 1 for functional history, 1 for physical examination, and 0 for clinical studies, which resulted in a grade B classification. After applying the net adjustment formula, he opined that appellant had one percent permanent impairment of each lower extremity. In a September 13, 2014 addendum, Dr. Doman clarified that the one percent permanent impairment was a final, total impairment and not in addition to the previously awarded five percent. In September 25 and 29, 2014 report, Dr. Dyer, an OWCP medical adviser, reviewed Dr. Doman's August 21 and September 13, 2014 reports and agreed with his evaluation and calculations that appellant had one percent permanent impairment of each bilateral lower extremity.

The Board finds that Dr. Doman and the OWCP medical adviser properly applied the A.M.A., *Guides* and determined that appellant had one percent permanent impairment of each

[13] *See* A.M.A., *Guides* (6th ed. 2009) 509-11.

[14] *Id.* at 515-22.

bilateral lower extremity. Both physicians referenced the appropriate tables concerning the nature of appellant's condition based on examination findings and provided medical rationale for the percentage of impairment in accordance with the A.M.A., *Guides*. As appellant has previously received a schedule award in this amount, she is not entitled to an additional schedule award.

The only other current medical evidence of record was a May 16, 2014 report by Dr. Gupta. Dr. Gupta related appellant's complaints of significant pain with both knee joints and noted a diagnosis of bilateral knee degenerative joint disease. Upon examination, he observed full extension range of motion to roughly 110 degrees on both sides and crepitus with the patellofemoral compartment. Dr. Gupta reported that appellant's symptoms were relatively stable and that conservative treatment measures did not provide much relief. The Board notes that Dr. Gupta's report did not address the extent of any permanent impairment due to appellant's injury, provide a description of any impairment in accordance with the A.M.A., *Guides*, or opine on whether appellant reached maximum medical improvement. OWCP procedures provide that to support a schedule award, the file must contain medical evidence which shows that the impairment has reached a permanent and fixed state and describes the impairment in sufficient detail so that it can be visualized on review and computes the percentage of impairment in accordance with the A.M.A., *Guides*.[15] Appellant did not submit such evidence. Accordingly, the Board finds that since there is no current medical report that provides an impairment rating there is no medical basis to support appellant's claim for an additional schedule award.[16]

Appellant may request a schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment.

CONCLUSION

The Board finds that appellant has not established more than five percent permanent impairment of each lower extremity, for which she previously received schedule awards.

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7 (February 2013).

[16] *W.T.*, Docket No. 15-214 (issued March 26, 2015).

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 22, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board